

[High Court of JUSTICIARY.]

April 22. 1780.

INFORMATION

FOR

JOHN KELLY game-keeper at Blair, Respondent,

AGAINST

JOHN SMITH portioner of Swinrigmuir, Appellant.

IN August last, the respondent gave in a complaint to the Justices of the Peace for Ayrshire, founded upon the statute of the 13th of his present Majesty, intituled, *An act for the more effectual preservation of the game in that part of Great Britain called Scotland*; in which, after narrating the statute, he subsumes, that Mr Smith, and others complained of, had been guilty of transgressing it, in so far as, "although no one of them is qualified to kill game," yet "each of them, within these last six months, have killed, had in their custody, or carried, twelve hares, twelve partridges, twelve muirfowl, and twelve snipes, all at different times, and within the shire of Ayr; and besides, they, the said John Smith and John Orr, had killed, or had in their custody, the like number of hares, partridges, muirfowl, and others, upon ground the property of gentlemen or heritors from whom they had no consent, or could procure no legal permission; and that within the shire of Ayr aforesaid."

Original complaint, and proceedings.

A

And

And the petition concludes, that each of the persons complained upon, should be found liable in a fine of 20 s. for each transgression, in terms of the statute.

The question came before a most respectable board of Justices, the Earl of Eglintoun, Major Blair of Blair, and Mr Reid Cunningham of Auchinharvie. And Mr Smith gave in answers; in which, after stating a very groundless objection, that the statute was not properly narrated in the complaint, he observes, that the act of parliament must refer, either to the statute 1685, c. 20. or to the act 1621, c. 21. Upon this last act, Mr Smith endeavours to found his defence. And the answers conclude with an insinuation that the complaint originated from one of the justices, who he is pleased to say had a pique at him.

The respondent has no occasion to enter into a vindication of the conduct of that gentleman, who he believes never had any sort of connection with Mr Smith, though very possibly he may have challenged him for trespassing upon his grounds.

A short reply was made to the answers, bearing, "That the defender is not proprietor of land to the extent of even L. 100 Scots of valuation, and humbly contends that nothing under L. 1000 Scots of valuation will qualify him."

And Mr Smith gave a declaration, which it is material your Lordships should attend to, as being directly contradictory to the plea which his counsel have since maintained in his name.

"The defender acknowledges, That his whole valuation amounts to about L. 130 Scots, and contends, that he having three ploughgates of land, he is qualified to kill game upon his own property, but not to shoot upon other gentlemens property without their consent. And produces a letter from Mr Cunningham younger of Auchinskeith, allowing the defender to shoot upon his father's lands of Auchinskeith, dated the 8th November 1777. He confesses he killed muirfowl in the muirs of Galston, belonging to Mr Wallace of Cessnock, upon the 12th and 13th days of August current, in company with Mr Cunningham of Auchinskeith, or his brother, who invited him; but denies that he hunted or killed muirfowl any where else since the 12th current. Acknowledges that his dogs have killed a hare or hares within the space of six months preceding the date of the libel, but does not recollect on whose property it was; and in respect of his defence, thinks it is not material. And this he declares to be truth."

" truth. And farther acknowledges that he was in company with
 " his dogs when they killed the hares above mentioned, and that
 " he took them into his possession."

Here is a clear admission that the appellant, within the period limited in the statute, had killed wild-fowl and four-footed game, upon the property of gentlemen from whom he had no permission. And the Justices gave judgement in the following words, both against Mr Smith and against another defender Hugh Ker.
 " Having considered the petition, defences for John Smith, *with*
 " *his declaration*, (and the confession of Hugh Ker, with the letter
 " produced), find, That the reference in the libel to the act of
 " parliament of the 13th of his present Majesty is sufficient;
 " and therefore repel the defences pleaded for Mr Smith on that
 " point; repel also the defence pleaded for him upon his being
 " proprietor of three ploughgates of land, valued at L. 130 Scots,
 " or thereby, in respect *that is not a sufficient qualification for any per-*
 " *son to kill game, or have it in their possession*, by virtue of the laws
 " and acts of parliament in Scotland, referred to in the said act
 " of parliament of his present Majesty libelled on; *and in regard*
 " the said Mr Smith has acknowledged that he killed and had in
 " his possession hares, within the space of six months from the
 " date of the petition; find him liable *as having transgressed the*
 " *said act of parliament*. (Also in respect the said Hugh Ker has
 " acknowledged that he has hunted, and killed muirfowl, since
 " the 12th of August current, and has not alledged he is qualified
 " in terms of law,) therefore find, That each of them have for-
 " feited 20s. Sterling, and decern and ordain them to pay the same
 " to the petitioner within the space of ten days hence, with cer-
 " tification, conform to the said act."

Hugh Ker acquiesced in the sentence; but Mr Smith thought fit to enter an appeal to the circuit-court of justiciary: and in his reasons of appeal his whole argument is summed up in the following words.

" What the appellant, therefore, humbly contends is, that he
 " being proprietor of and possessed of heritage to a much greater
 " extent than a plough of land, that, in terms of the foresaid fe-
 " veral acts of parliament, and laws before quoted, and particu-
 " larly of the act 1621, c. 31. made in the 23d parliament of King
 " James VI. he is intitled to hunt and kill game *on his own pro-*
 " *perty,*

" *perty*, and consequently to have the same in his possession ; for
 " which reason," &c.

Sept. 25. 1779. The appeal was argued before Lord Hailes at the circuit-court of justiciary held at Ayr ; and his Lordship gave the following deliverance. " Having considered the procedure before the justices
 " of the peace, reasons of appeal, and heard parties procurators,
 " in respect that by the act of parliament of the 13th of his present Majesty charged on, it is enacted, " That every person whatsoever *not qualified* to kill game in Scotland, who shall have in
 " his or her custody, or carry, at any time in the year, upon any pretence whatsoever, any hares, partridges," &c.; and that the
 " words of the said statute are general, and do not ascertain, either directly or by special reference to any former statutes,
 " what is to be understood by not being qualified ; wherefore on account of the difficulty thence arising, certifies the cause to
 " the High court of Justiciary at Edinburgh, in order that the same may be tried and determined in that court, agreeable to
 " the former statutes."

Mar. 11. 1780. In consequence of this deliverance the cause was, of this date, pleaded before your Lordships ; when you ordered informations. And in obedience to that order, what follows is humbly offered on the part of the respondent in the appeal.

Grounds of the judgement, The interlocutor of the justices of the peace is so expressed, as to give your Lordships an opportunity of determining the general question of the right of killing game ; for it repels the defence pleaded upon the appellant's allegation, that he was proprietor of more than a ploughgate of land ; and upon that ground, as well as the admission in his declaration, which being expressly referred to in the judgement, will be considered as part of it, That he had killed both muirfowl and hares within the space of six months, the justices find that he had transgressed the act of parliament ; and though they were so moderate in their sentence, as to find him liable only in a single penalty, it is vain for the appellant to attempt to limit to one of those offences a judgement which is equally applicable to the other.

and questions thence arising. Upon the footing of the appellant's own declaration, the question, if it can be called one, is only this, Whether the proprietor of a ploughgate of land is intitled to destroy the game of all kinds, not only upon his own small property, but also upon that of every gentleman in the kingdom, without his permission ? And here

here it is unnecessary to use argument. The case is too clear to require it; for the appellant himself admits, that if he had any right at all, it was limited to his own property, and that he was not intitled to kill game elsewhere, without leave of the proprietor. He stands condemned, therefore, out of his own mouth: for he admits, that he killed muirfowl upon the muir of Galston, without any licence from the proprietor; he admits, that he killed hares, but he does not *recollect* upon whose property it was.

Thus the matter stood when it was under the consideration of the justices of the peace. But the appellant's counsel have since found it necessary to plead a defence of a very different kind. They saw, that what had been formerly pleaded never could avail their client, since, while he claimed right only to kill game upon his own property, he admitted that he had actually killed it upon the property of others. This obliged them to change their ground; for they had no cause unless they could show, that every proprietor of the most insignificant bit of land was intitled to kill game over the whole kingdom.

In this view they appealed to the maxim of the Roman law, by which all wild animals are considered as the property of the first occupant. They are *res nullius, quæ cedunt occupanti*.

The respondent does not recollect, that in the course of the late hearing before your Lordships, a single authority was offered to show that this maxim of the Roman law ever had been received with us. But at the hearing at Ayr, some weight was laid upon a passage from a treatise, intitled, *Forme and maner of Baron Court*, which it may be proper to take some notice of, lest it should find a place in the appellant's information. The words are: "In the
" time of King Alexander, na maner of waters were defended
" from fishing of salmond, but waters runnand to the sea. Nor
" zit was not defended, nor forbidden to any man to hunt, nor
" to chase the hare, and the fox, and uther wilde beastes, with-
" out forests and warrandes, wheresoever they were founden."

Forme and
maner of Ba-
ron Court, c. 52

That this treatise is of no sort of authority, is plain from the preface of Sir John Skene who published it. "This treatise fol-
" lowing, and writtin in English language, be *some* learned lawer,
" *not lang time bygane*, as the style of the samen declares, is pu-
" blished with the rest, because it conteines ane interpretation of
" diverse and sundrie chaptours of the treatise immediatelie pre-
" ceeding, as is noted in the margin." Accordingly, it is no more than a commentary upon the *Quoniam attachiamenta*, or a kind of *form of process*; and the passage about hunting and fishing, is
B brought

brought in without any sort of connection, either with the subject of that treatise, or of the commentary itself. Indeed, being the work of an uncertain author, but a little before Sir John Skene himself, who lived in the time of James VI. it is plain that a bare averment of what was law in the time of King Alexander, three or four hundred years before, never can be considered as of any sort of authority. There is no law of any of the Alexanders extant with respect to the right of hunting; but it is clear that the author, whoever he was, was wrong with respect to salmon-fishing; for the law of Alexander II. respecting the mid-stream and Saturday's-flap, is not limited to public rivers, if that is meant by "waters runnand to the sea," but extends to all rivers without distinction.

*Res nullius sunt
Domini Regis*

No weight therefore can be laid upon this anonymous passage. And it will not be a difficult matter to make out, that the rule of the Roman law never was received in this country; that, on the contrary, the maxim of our forefathers, as well as of every other feudal country was, that *res nullius sunt Domini Regis*.

Conf. F. l. 2.
c. 56.

This maxim may be gathered from the *Consuetudines feudorum*, under the title, *Quæ sint regalia*. "*Regalia, armandiæ, viæ publicæ, flumina navigabilia, et ex quibus fiunt navigabilia, portus, ripatica, vectigalia, quæ vulgo dicuntur telonia, moneta, multarum poenarumque compendia, bona vacantia, et quæ, ut ab indignis, legibus auferuntur, nisi quæ specialiter quibusdam conceduntur; bona contrahentium incestas nuptias, condemnatorum et proscriptorum, secundum quod in novis constitutionibus cavetur; angariarum, parangariarum, et plaustrorum, et navium præstationes, et extraordinaria collatio ad felicissimam regalis numinis expeditionem, potestas constituendorum magistratuum ad justitiam expediendam; argentariæ et palatia in civitatibus consuetis; piscationum redditus et salinarum, et bona committentium crimen Majestatis, dimidium thesauri in loco Cæsaris inventi, non data opera, vel loco religioso: si data opera, totum ad eum pertineat.*"

Borcholten
Comm. in Conf.
Feud. c. ult.

Feudal writers define the *Regalia* in the following manner: "*Regalia sunt jura quæ Imperatori concessa sunt in præmium immensi laboris quem pro imperio sustinet. Dicuntur Regalia quod Imperatori competant, quem feudorum auctores Regem nominant.*" And the general rule is to be found in the most ancient

Qn. Att.

c. 48. § 4. 5.

books of our law. Thus, in the *Quoniam attachiamenta*, "*De jure positivo sunt eschetæ, utpote si terræ aliquæ, vel loca, aut a-*"
"liquæ"

“ *lique alie res sunt in regno, quæ sub nullius dominio occupantur; quæ*
 “ *omnia sunt regis ipso jure.* Et sic sunt omnes thesauri sub terra
 “ absconditi, et in aliis locis de quibus domini nesciuntur, nec
 “ aliquis ponit calumniam de eis; Domini Regis sunt, et dicuntur
 “ fore eschetæ ipso jure. Sed si constiterit quorum fuerint, the-
 “ sauri tales inventi, non debent eschetæ censerî.”

Accordingly in the Forest laws, it is plainly supposed, that a particular clause in an infeftment is necessary in order to enable a person to hunt even upon his own property. “ Si quis libere-^{LL. F. ch. 17.}
 “ tenens habens, *ratione sui infeofamenti*, potestatem venandi in^{§ 2.}
 “ propriis teris, propè forestam regis, patitur canes suos currere
 “ in propriis terris: et illi insequuntur bestiam infra forestam re-
 “ gis: potest canes suos sequi in foresta, eo usque, quò possit
 “ jactare suum cornu, vel suorum canum ligaturam.”

The law is the same at this day, as appears from the clause *cum aucupationibus et venationibus*, which is generally inserted in charters from the crown; a tacit declaration, that, without that clause, the conveyance of the property would not carry the right of hunting and fowling. And similar clauses are inserted, by which other rights, acknowledged to be *inter regalia*, are conveyed, as mines, fishings, jurisdictions, &c. It was said at the bar, that the appellant had a clause *cum aucupationibus* in his charter. But had it been so, the charter would have been produced, though, as he is no more than a *feuar* or a *portioner*, not holding of the crown, it is believed, that clause, contained in a base right, would not have availed him. In fact, however, he has no such clause, as it is supposed will be admitted, if your Lordships think it worth while to put the question. Any argument, therefore, founded upon this clause, turns directly against the appellant.

As to the general maxim, multitudes of authorities might be brought from the writers upon the law of nature and nations, to show, that the doctrine of the Civilians, with respect to their *res nullius*, has not been received in modern countries. Grotius refers to many of them; and his own words are these: “ De feris,^{Grotius de J. B. et P. II. 2.}
 “ piscibus, avibus, illud notandum est: *Qui imperium habet in ter-^{5.}*
 “ *ras et aquas, ejus lege impediri posse aliquos, ne feras, pisces, aves*
 “ *capere, et capiendo acquirere eis liceat;* atque hac lege teneri e-
 “ tiam exteros. Ratio est, quia ad gubernationem populi mo-
 “ raliter necessarium est, ut qui ei vel ad tempus se admiscant,
 “ quod fit intrando territorium, ii conformes se reddant ejus po-
 “ puli institutis. *Nec obstat quod sæpe in jure Romano legimus,*
 “ *jure*

“ jure naturæ, aut gentium, liberum esse talia animalia venari : hoc enim verum est quamdiu lex civilis nulla intercedit ; sicut lex Romana res multas relinquebat in illo primævo statu, de quibus aliæ gentes aliud constituerunt. Cum autem lex civilis aliud constituit, eam observari debere jus ipsum naturæ dicat : lex enim civilis, quanquam nihil potest præcipere quod jus naturæ prohibet, aut prohibere quod præcipit, potest tamen libertatem naturalem circumscribere, et vetare quod naturaliter licebat, atque etiam ipsum dominium naturaliter acquirendum vi sua antevertere.”

II. 8. 5. And in another passage he says, “ Valde falluntur recentiores jurisconfulti, qui hæc ita putant naturalia ut mutari nequeant ; sunt enim naturalia non simpliciter, sed pro certo rerum statu, id est si aliter cautum non sit. *Germaniæ autem populi*, cum principibus ac regibus bona quædam essent assignanda, unde dignitatem suam sustinerent, sapienter existimarunt ab illis rebus incipiendum quæ sine damno cujusquam tribui possint, *cujusmodi sunt res omnes quæ in dominium nullius pervenerunt.*”

This is perfectly agreeable to the law of Scotland ; in which it will be found, that the maxim, “ *Res nullius sunt Domini Regis,*” holds in its fullest extent. It holds even in things which formerly had an owner. Upon the death of a bastard, without heirs of his body, not only his moveables, but even his lands go to the King, though perhaps it might be thought, that the superior should have been preferred upon the failure of issue of his grantee. In like manner, where a person dies, leaving no relations that can instruct their propinquity, his succession goes to the King, as *ultimus hæres*.

Select Decisions, No 51.

The principle is explained in a late Collection of Decisions. “ The King is named last heir, not that he is an heir in any proper sense, but only *that he has right, jure coronæ, to all goods which have no proprietor.*” By the Roman law, treasures hid in the earth belonged to him that found them ; but by our law, they belong to the King : nay, the fraudulent concealment of them is made criminal, and seems to be reckoned among the pleas of the crown. Wrecks likewise belong to the King ; and the same rule holds in the case of things which may be said never to have had an owner, as gold and silver mines, salmon in rivers, swans.

R. M. IV. 4.
1. & I. 1. 7.
St. Alex. II.
c. 25.

The respondent cannot see a reason why the rule should not equally apply to the whole class of things denominated by Civilians *res nullius* ; by which expression he understands what by its nature cannot

cannot be the property of the individual subjects of a state, but which may be the property of the state itself. The fish upon the *banks of Newfoundland*, while they remain in the bottom of the ocean, cannot be reckoned the property of those who go to catch them ; but the banks themselves, and all the fish upon them, are the acknowledged property of Great Britain. The fisheries upon our own coasts are in the same predicament. The dominion of the *narrow seas* has been supported by argument, and it has been asserted and acquiesced in.

If then the maxim has been extended to subjects of such vast importance, no reason can be assigned why it should not apply to that now before your Lordships, the article of *Game* ; which, though of less consequence no doubt, has still been considered as not unworthy of the public attention. The principle upon which the appellant himself put his defence was abandoned by his counsel, who admitted, that game was incapable of several property. Indeed it would be absurd to say, that the flight of a bird, or the course of a hare, should vest the property in the owner of the soil : they are on the territory of one person to-day, and they may be upon the territory of another to-morrow. But though game seems incapable of several property, there is no absurdity in considering it as the property of the country where it drew its first breath, where it receives its nourishment, and from which by the law of its nature it cannot pass. And it is animals in that situation only which are reckoned game : none of the statutes either in Scotland or England extend to *woodcocks*, birds of passage, hatched in Russia, which spend a few of the winter months in the milder climates, and then return to the place of their birth.

The respondent has made these observations in the view of establishing the principle upon which the general question falls to be determined ; and it is immaterial to his argument, whether game shall be held to belong to the state, or to the King, the representative of the state ; still it will be incumbent upon whoever pretends right to it to point out an act of legislature in the one case, or a grant from the Sovereign in the other. The respondent should have been glad to be able to lay before your Lordships authorities from the later writers on the law of Scotland, but he has searched for them in vain ; and he believes it will be found, that not one of our authors has treated the subject in a systematical manner, or so much as attempted to investigate the principles applicable to it. In default of their assistance therefore he must

The principle
applies to
Game ;

and whoever
claims right to
it must instruct
his qualifica-
tion.

have recourse to those of other countries ; and in a general question of Feudal law, where a common principle may be expected to run through the laws of every country originating from that source, almost equal weight will be laid upon foreign as upon domestic authorities ; especially if it can be shown, that the statute-law of this country can be traced to that common principle.

Sketch of foreign game-laws.

Saxony.

Struv. Synt. Juris ad tit. de A. R. D. num. 10.

Struvius, a Saxon lawyer, in his treatise intitled, “ Syntagma Jurisprudentiæ secundum ordinem Pandectarum,” after explaining the general rule of the Roman law with respect to the *res nullius*, sets in opposition to it the modern practice of his country in the following words. “ *Hodie, jus venandi jure superioritatis pertinet ad principes, et ab his rursus quibusdam conceditur. Cum enim feræ, licet in privatis fundis vagentur, in nullius sunt dominio, potestas vero occupandi ab omnes de populo pertinuerit, sine ullius injuria, ob rationes civiles, mutato rerum, ac rerum publicarum statu, illa promiscua potestas occupandi à superioribus rectè interdicta est subditis, ac illis, qui populo ac territorio præsumunt, propria reddita, adeoque penes eos est, quibus istam concedere velint.*”

num. 12.

In like manner, with respect to fowling he says, “ *Hodie jus aucupandi non quidem simpliciter omnibus concessum.*” In support of both these propositions he quotes numberless authorities, with which it is unnecessary to trouble your Lordships. Indeed it is believed authorities might be brought from every corner of Germany, and from every country of Europe whose law is of feudal original.

Holland.

In Holland the game-law seems to stand upon much the same principles with ours, though it is believed the qualification is higher, and the prohibitions more numerous and severe ; as may appear in some measure from a short abstract which Voet gives of them.

Voet ad tit. de A. R. D. num. 6.

“ Ac generaliter, jura tum piscationum, tum venationum, tum aucupiorum, multis modis *hodie* limitata sunt, ratione *personarum*, locorum, temporum, modi, instrumentorum, &c.; uti id de venatione per Hollandiam instituenda peti potest, ex multis placitis ordinum Hollandiæ, vol. 1. plac. Holl. p. 1315.—1430. &c.; vol. 2. p. 2887.; vol. 3. p. 608.—628.; quibus inter alia cautum, *quales* habeant, aut non habeant, in Hollandia venandi jus. — Vol. 1. p. 1382. 1384. 1386. Ne habeant illi qui titulis Comitum, Baronum, Nobilium, Equitum, ab
“ *externis*

" externis regibus aut principibus instructi sunt, si non ex
 " alio capite jus venandi iis competat.—Vol. 3. p. 608. 609. Ne
 " cervos aut apros quisquam capiat, eo excepto quod baronibus
 " capere liceat unum quotannis.—Vol. 1. p. 1344. art. 31. vol. 3.
 " p. 618. art. 33. Ne *laqueis* perdices aut lepores capiantur.—
 " Vol. 3. p. 619. art. 43. p. 624. fin. Neve aliis modis plurimis
 " abutantur suo jure in leporibus et perdicibus capiendis, qui
 " jus venandi habent.—Vol. 1. p. 1362. 1366. seqq. Ne quis u-
 " tatur ad capiendos cuniculos canibus venaticis, quos appellant
 " *tuymelaars*, paucis personis exceptis. Vol. 1. p. 1380. vol. 3.
 " p. 616. Ne quis per domesticos aut peregrinos leporum vena-
 " tionem instituat, si ipse præsens non sit.—Vol. 2. p. 2887. Ne
 " canes venaticos alant qui non habent jus venandi.—Vol. 1.
 " p. 1380. Ne *saltuum præfectus* indulgeat ulli venandi jus, cui
 " id ex lege non competit.—Vol. 1. p. 1376. 1377. 1378. 1379.
 " Ut accipitres in Hollandia capti ad aulam deferantur, et ne a-
 " liunde advecti distrahantur aliis, priusquam aulæ oblati fue-
 " rint."

Hence it appears, that the law of Holland differs exceedingly on this subject from the Roman law. By the latter, wild animals of every sort were lawful prey to every person who was at the trouble of catching them; but by the modern law of Holland, the learned author tells us, the right of fishing, hunting, and fowling, is laid under various restrictions, in respect of persons qualified or not qualified, of places where hunting is lawful or not, of the seasons of the year, and of the manner in which game may be killed. Thus snaring of partridges or hares is prohibited; nay, *masters of the game* are mentioned, who, as in this country, while the office subsisted, can only give licences to such as have the legal privilege of demanding it: and all these rules and restrictions are enforced by numberless ordinances of the states of Holland.

There is something singular in the regulation with respect to the hunting of rabbits with a particular species of dogs called *Tuymelaars*, which it seems requires a qualification enjoyed by few. These dogs are the same with what are known in this country under the name of *Tumblers*; of which the following curious description is given in the *Dictionary Rusticum*. " Tum-
 " bler, called in Latin *vertagus*, from the Latin word *vertere*, to
 " turn; and thus, in English, from his quality of tumbling and
 " winding

“winding his body about circularly, and then fiercely and vio-
 “lently venturing on the beast, so that he suddenly grips it at
 “the very entrance or mouth of the hole or receptacle, before it
 “can make any recovery or self-defence. Besides this, he uses
 “another sort of subtilty: for, running into a warren, or fetch-
 “ing a course about a coney-borough, he does not hunt after,
 “or shew any spight against them, but dissembling friendship,
 “passes by with silence and quietness, marking their holes di-
 “ligently, wherein he is seldom mistaken; and being sure of the
 “place, couches down close to the ground with his belly, pro-
 “vided the wind be against him; and the coneys discover not
 “where he lurks; by which means he gets advantage of their
 “scent, either going to their holes, or coming out, or passing
 “this way or that way; so that he debars the silly coney from
 “her hole, fraudulently circumvents her before she can enter,
 “and immediately carries his prey to his master. These dogs
 “are sometimes less than the hounds, being lanker, leaner, some-
 “what pricked eared; and, by the form of their bodies, may ve-
 “ry well be called mungrel grayhounds, if they were somewhat
 “bigger.”

When the same, nay severer restrictions, are imposed by the
 laws of a free republic, it is but with a bad grace that the appel-
 lant pretends to arraign our statute 1685, as the most despotic act
 of an arbitrary reign. That statute will be fully considered in the
 sequel. Meanwhile it may not be improper to advert to the prin-
 ciples of the English law, as laid down in two of the standard books
 of that country.

England. Dr Burn, in his title of *Game*, sets out with the principle,
 That wild animals are not, and cannot be, the property of indi-
 viduals, so long as they retain their natural liberty. From which

Burn, *Game*, he infers, that they are the property of the King: “It is a ma-
 p. 218. xim of the common law, That such goods of which no one

“can claim any property, do belong to the King by his prero-
 “gative; and hence all those animals *feræ naturæ*, which come
 “under the denomination of *game*, are styled in our laws *his Ma-
 “jesty’s game*.” It is upon this principle that he explains the

ibid. English statutes: “And upon this foundation the several acts of
 “parliament are established for the preservation of these species
 “of animals, for the recreation and amusement of persons of
 “fortune, unto whom the King, with the advice and assent of
 “parliament,

“parliament, hath granted the same, and to prevent persons of
 “inferior rank from spending that time which their station of
 “life requireth to be more profitably employed. For these re-
 “strictions do not take from the country-people any right which
 “they ever had, but only grant unto some persons those privi-
 “leges which before rested solely in the King; 2. Bac. Abr. 612.
 “613.”

Sir William Blackstone derives the game-laws from the consti-^{2 Comm 413.}
 tutions of the feudal policy. He takes notice, that they are
 strongest in France and Germany, where the feudal system has
 continued most entire. He lays down, That, as *bona vacantia*,^{ibid 415.}
 game belongs to the King; and he bestows a great and a just en-
 comium upon the general tendency and effect of those laws:

“No man, however well qualified he may vulgarly be esteemed,^{p. 418.}
 “has right to encroach upon the *royal prerogative*, by killing of
 “game, unless he can show a particular grant of free warren, or
 “a prescription which presumes a grant, or some authority un-
 “der an act of parliament. As for the latter, I know but of
 “two instances wherein an express permission was ever given to
 “kill game by statute; the one by 1^o Ja. I. c. 27. altered by
 “7^o Ja. I. c. 11. and virtually repealed by 22^o and 23^o C^o II.
 “c. 25. which gave authority, so long as they remained in force,
 “to the owners of free warren, to lords of manors, and to all
 “freeholders having L. 40 *per annum* in lands of inheritance, or
 “L. 80 for life or lives, or L. 400 personal estate, and their ser-
 “vants, to take partridges and pheasants upon their own or their
 “masters free warren, inheritance, or freehold; the other, by
 “5^o Anne, c. 14. which impowers lords and ladies of manors to
 “appoint game-keepers to kill game for the use of such lord or
 “lady; which, with some alterations, still subsists, and plainly
 “supposes such power not to have been in them before.”

Such is the acknowledged principle of the game-laws of Eng-^{Statute-law of}
 land; and though little light is to be got from the writers upon ^{Scotland found-}
 the law of this country, the respondent will have no difficulty of ^{ed upon the}
 showing, that the same principle runs through every *statute* in ^{same principle.}
 Scotland upon the subject of the game; that there is not one of
 them which is not reducible to that principle, or which can be
 explained upon any other. All of them speak out, that the pro-
 perty of the game is vested in the King, or in the state; the one or
 the other is sufficient for the respondent's argument.

Killing of
hares in snow
forbid.

Stat. Rob. III.
c. 10.

In Scotland, game has all along been considered as a public concern. It is upon this principle, that the killing of hares in time of snow was prohibited so far back as the reign of Robert III. "Nullus inveniatur ad lepores interficiendos tempore nivis, sub foris-facto sex solidorum octo denariorum, absque remissione aliqua, levandorum ad usum domini terrarum; et in ejus defectu ad usum Domini Regis per vicecomitem."

1457. c. 88.

The prohibition was renewed by James II. "Anent the slayers of hares in snaw-time, and destruction of cunningses, the three estaites declairis that to be a poynt of *dittay*." It

1474. c. 60.

was again renewed by James III. And it is remarkable, that according to the old Forest laws, the fines for transgressions committed in forests granted to a subject, belong to the King, if not levied by the owner of the forest, and a compromise for the offence is punishable by a fine against the baron himself. "Si domi-

Leg. For.

c. 21. § 3. 4.

"nus forestæ non vult persequi prædictam transgressionem, vel, particulari affectione et amicitia motus, erga ipsum malefactorem dissimulat, et fingit se nescire tale crimen; nihilominus Rex habet jus, et titulum petendi decem libras; propter violationem sui mandati, et inhibitionis prædictæ. Præterea, si dominus forestæ pecuniam aliquam vel munera accepit ab ipso malefactore, et ideo concelat ipsum crimen, et non vult illud persequi in curia Regis, Rex habet justam actionem pro decem libris contra ipsum dominum, eò quod cessat persequi dictum crimen."

1424. c. 36.

By another ancient statute it is enacted, "That the *Justice-Clerke* sal inquire of stalkers that slayis deare, and alsoone as onie stalker may be convict of slauchter of deare, he sal paie to the King fortie shillings, and the halders and maintainers of them sal pay ten poundes." And another statute enacts, That

1474. c. 68.

no man shall kill fawns till they be a year old.

These statutes are inconsistent with the idea either of several property, or of right by mere occupancy. Had game been considered as the property of him upon whose ground it is found, he would have been allowed to kill it in what manner, and at what time he thought fit. No person is restricted with respect to the management of domestic animals, his acknowledged property. If game had been held to be acquired at pleasure by the first occupant, he would have been left to exercise that right without controul. And it is remarkable, that in the law of England, where the

the principle that regulates the game-law is indisputably clear, the very same enactments are to be found. Thus stalking is punished with a fine of L. 10; and the destruction of hares in time of snow is forbid under a penalty.

19 Hen. VII.

c. 11. 14 & 15

Hen. VIII.

c. 10.

Close time.

Another regulation, which makes a capital figure in the game-law of both countries, is plainly deducible from the same principle; indeed cannot be explained upon any other. What the respondent has in view is the statutes respecting the *close time*, by which the commencement of the season of killing grouse has been varied from the 20th of June, at which it was fixed by 1707, c. 13. to the 12th of August, by 13^o Geo. III. And similar variations have been made by succeeding statutes with respect to the conclusion of the season. With respect to other species of game, the legislature has been equally attentive; and the whole system respecting the close time plainly proceeds upon this leading principle, that game is a public concern, the lawful season being narrowed more and more, according to the progressive decrease of the game.

It is very remarkable, that in salmon-fishing there is a regulation precisely of the same kind, a *close time* introduced to prevent the destruction of the species. “Omnes aquæ in quibus capiuntur salmones ponuntur in defenso ad capiendos salmones a die natalis vel assumptionis B. Mariæ Virginis ad festum S. Martini;” that is, from the 15th of August till the 30th of November. And there are various regulations respecting the mid-stream, the Saturday’s flap, the dimensions of the hecks in cruives, the intention of which is precisely similar to that of the restrictions upon the destruction of game. In treating of salmon-fishing, all our lawyers are agreed as to the reason of these regulations. It is, they say, because salmon-fishing is *inter regalia*, because it is a public concern. The respondent agrees in the principle, but he would have it carried its full length; and when it is universally admitted, as the only explanation that can be given of the regulations respecting salmon-fishing, he cannot conceive how there should be any hesitation in applying it to regulations so extremely similar with respect to game.

Qu. att. c. 97.

1424. c. 36.

By various statutes, the *selling* of game is prohibited under severe penalties. And it may not be improper to lay before your Lordships the words of the act 1600, as tending to explain the principles of the game-law. “Forfameikle as by common consuetude of all countries, special prohibition is made to all sorts
“ of

Selling of
game prohibited,

1600. c. 23.

1621. c. 30.

1685. c. 20.

“ of persons to slay wyld-foule, hair, or vennison, *except sik as,*
 “ *by their reuenerwes, may bear the charges and burdings of the halkes,*
 “ *hounds, and dogs, requisit in sik pastymes;* in respect the famine,
 “ as well hes bene created for the recreation of mankind, as for
 “ their sustentation; lykeas it is of trueth, that by diuerse and
 “ fundry acts of parliament, other statutes and *proclamations* made
 “ heretofore, all slaying of said wild-foule and beastes by any
 “ indirect means, sik as hagbut, girn, net, and *fowller dogg,* is
 “ specially forbidden, and diuerse penalties contained in the fa-
 “ mine actes; yet nevertheles, sik hes bene the slackness of the ex-
 “ ecution of the famine, that diuerse and fundry persons, having
 “ greater regard of their gaine and commodity, whilk they pur-
 “ ches by the selling of the said wyld-fowle to sik persons wha
 “ prefers their owne inordinat appetite and gluttony, either to
 “ the obedience of the saids lawes, or to the recreation that may
 “ be had by the direct slaying of the famine, hes used all the
 “ saids indirect means in slaying of the saids wyld-fowles and
 “ beastes, whereby this country, being so plentifully furnished of
 “ before, is become altogether scarce of sic waires: For remeed
 “ whereof, and that the continuing of the said abuse may not
 “ procure worse inconvenients, seeing in time of peace, in all
 “ time bygane, the saids pastymes of hunting and halking were
 “ the only means and instruments to keep the haill lieges bodies
 “ fra not becoming altogether effeminat, our Sovereigne Lord,
 “ and Estates of Parliament, finding, that the discharging of the
 “ selling of the saids wild-fowle, and venison, shall procure an
 “ remeed of the abuse foresaid, have therefore discharged, like-
 “ as by these presents they discharge, any persons whatsoever,
 “ within this realm, in any wise to sell, or buy, any fastan reid,
 “ or fallowe deare, daes, raes, hares, partridges, moor-fowles,
 “ black-cokes, aith-hennes, termigants, wyld-dukes, teilles, at-
 “ teilles, goldings, mortyms, schidderenis, skaildraik, herron,
 “ butter, or any sik Rynde of foules, commonly used to be cha-
 “ sed with halkes, under the paine of an hundreth pounds, to
 “ be incurred als well by the buyer as the sellar. And in case of
 “ the inhability of any of the saids persons to pay the said summe,
 “ that the apprehender of them shall cause them be scourged
 “ throw the burgh or town where they shall be apprehended.
 “ And als discharges any of the saids lieges, in any wise to slay
 “ any of the wyld-fowle or beasts above specified, by girn, net,
 “ or

“ or hagbut, under the paine above specified, to be incurred by
 “ them : For execution whereof, our Sovereigne Lord hes given
 “ and graunted power and commission to all schireffs, stewarts,
 “ baillies, als well of regalities as royalties, provest and baillies of
 “ burrowes, and every barron within his awne barronie, special
 “ justices, to that effect, giving them full, free, and plene power
 “ to uplift or execute the paines above specified, against the trans-
 “ gressors of these presents, *the one halfe of the saids pecunial paines*
 “ to be intronnetted with by them, *to apperteine to our Sovereigne*
 “ *Lord, and to be paid to his Heighness thesaurer,* and the other
 “ half to the delator and apprehender. And because ane of the
 “ greatest occasions of the scarcitie of the saids partridges and
 “ moor-fowles, is by reason of the great slaughter of their pouts
 “ and young anes, when as for youth neither are they habile
 “ to give pastyme, and for quantity can no wise be ane great
 “ refreshment ; therefore our Sovereigne Lord hes discharged all
 “ his Heighness’s subjects whatsumever, in anywyse to slay or
 “ eat any of the saids moor-pouts, or of any other kyndes, be-
 “ fore the third day of Julii, or partridge-pout before the aught
 “ day of September ; alwyse our Sovereigne Lord, and Estates
 “ foresaids, declares, that this present act shall nowyse compre-
 “ hend cunnings, wood-cock, plevares, nor wyld goose, but the
 “ famen to be slaine with nets, and others engynes not forbidden
 “ by the laws of this realme, and to be coft and fawld as lawful
 “ merchandice as of before.”

These enactments plainly suppose game to be the property of
 the public, not of individuals. And it may be proper to observe,
 that the English law is the same in this respect. The selling of
 game is prohibited by 1^o Ja. c. 27.; and the prohibition was
 renewed 28^o Geo. II. c. 12. This, surely, is altogether inconsis-
 tent with a right of several property, subsisting in the owner of
 the ground ; and the restrictions are no less so which have been
 laid upon the *mode* of killing game.

One mode of killing it, though now much in practice, was ab-
 solutely prohibited till very late in our law. *Shooting* game, or <sup>Shooting of
game prohi-
bited.</sup> killing it with the gun, was unlawful, till the act 1685 permitted
 it to a certain class of persons. Thus the statute 1551, c. 9. en-^{1551, c. 9.}
 acts, “ That nane of our Sovereigne Ladie’s lieges, of whatsum-
 “ ever degree he be of, tak upon hand to schutte at deare, rae,
 E. “ or

“ or other wilde beastes, or wilde fowles, under the pain of death, and confiscation of all their guds.”

The punishment was soon made more moderate; but the prohibition was continued by 1567, c. 16. which reduces the penalty to forfeiture of moveables. This statute proceeds upon the preamble, “ That the saidis beastes and fowles are at all times flaine down and destroyed, be sik persones that nouthar has regairde to the *commoun weill*, nor *policie of the countrie*.” And 1581. c. 123. it is specially ratified by a subsequent act, which requires “ the lordes, heritours, or possessours, of the ground, to present the contraveener of the said act to the ordinar judge within quhais boundis the said contraveener dwellis, and makis residence.” And it imposes a fine upon the judge, of L. 100 for the first fault, and L. 200 for the second, doubling the penalty for each subsequent offence, if so oft as *dittay* shall be given him he does not execute the same.

1597. c. 270. The act 1597, c. 270. ratifies the above statutes, and “ ordains the same to be put to dew execution in all time hereafter, with this addition, that it fall be leasum to every schireffe, steward, baillie, and barrone, within his awin boundis, to slay all *lying dogges*, *qubilks the fowlers uses*, for slauchter of the said wilde fowles, and take and apprehend the said fowlers themselves, and put them in the stockes, and detaine them therein, for the space of 48 houres, als oft as they be apprehended.”

In like manner, the first act laying down regulations for the proceedings of justices of the peace, which had been newly introduced by the act 1609, c. 8. has this clause: “ The saids commissioners shall put his Majesty’s acts of parliament to execution against cutters and destroyers of planting, greenwood, orchards, yards, haynings, breakers of dove-houses, and cunningers, stealers of bees and bee-hives, slayers of red and black fish and smolts, in forbidden time, *users of unlawful games with lying dogs*, fowlers fowling on other mens lands, makers of moor-burne and moss-burne,” &c.

It was said, That these enactments did not relate to the killing of flying game with the gun, which could not be carried on to much purpose before the *invention*, as it was called, of setting-dogs or pointers; and Mr Horace Walpole was appealed to as saying, that they were not known till a later period. Mr Walpole,

pole, however, gives no opinion upon the subject; only quotes the following passage from Wood's *Athenæ*; who, in speaking of Robert Dudley, son of the Earl of Leicester, the favourite of Queen Elisabeth, says, "He was a complete gentleman in all Athenæ Oxon. vol. 2. p. 127. suitable employments, an exact seaman, an excellent architect, mathematician, physician, chymist, and what not? He was a handsome personable man, tall of stature, red-haired, and of admirable comport, and above all noted for riding the great horse, for tilting, and for his being the first of all *that taught a dog to sit, in order to catch partridges.*" But whatever his hero may have been, it is plain Mr Wood was no sportsman, otherwise he would not have spoke of *teaching* a dog to sit to catch partridges, for whoever has seen a *true-bred* pointer brought to the field for the first time, knows that he sits from instinct, and that the only difficulty is to get him to be less cautious than he is by nature. And the respondent cannot but think that the authority of our statutes must overbalance the assertion of Anthony Wood; for it is plain that the *lying dogs* mentioned in 1597, c. 270. and the *fowler dog* spoke of in 1600, c. 23. are no other than what is now known by the name of pointer or *setting-dog*. As to the *laid dogs* that have been mentioned, these were used for taking *four-footed* game:

"*Tum laqueis captare feras, et fallere visco*
 "*Inventum: et magnos canibus circumdare saltus.*"

Georg. I. 139.

At the same time it may be observed, that Robert Dudley, whom Mr Wood speaks of, was born in the year 1573, so that it is possible his discovery, if he made one, might have come the length of Scotland by the 1597.

It was also remarked, that shooting of wild-fowl could not be in common use till the present improved form of locks was introduced. But the statute-book both of England and Scotland affords satisfactory evidence, that the practice was so general as to require severe penalties to repress it. Indeed a bird upon the ground could be as readily killed with a *match-lock*, as the best modern fowling-piece; and it is certain, that the art of shooting upon the wing was not introduced till about the beginning of the present century. Sir Roger de Coverlay, in the *Spectator*, which
 was

Barrington's
Observations,
p. 408. n.

was published in the year 1711, concludes the character of one of his neighbours, by saying, "In short he is a very sensible man, shoots flying, and has been several times foreman of the petty jury." And Judge Barrington says, "Less than a century ago, when a bird was once on the wing, the shooter dropped his gun, despairing to hit it; and I have myself conversed with old men, who could find all sorts of game on the ground." In the Philosophical Transactions for the year 1675, an abstract is given of a treatise just published, intitled, *The gentleman's recreation*, being a dissertation upon hunting, hawking, fowling, and fishing; for which inquiry was made without success. From the abstract, however, it appears, that one of the modes of killing wild fowl was by the *fowling-piece*, and *stalking-horse*, which could only be made use of while the bird was on the ground.

There are some species of game, the shooting of which is still unlawful. By 1685, c. 20. the shooting of hares and heron at any time is forbidden; and the act 1707, c. 13. enacts, that no person whatsoever shall shoot hares. The law is the same at this day.

In these prohibitions against shooting, it is remarkable that the English law is much the same with ours; and the inference is fair, that the principle cannot be different. By a statute of Henry VII. the use of cross-bows is prohibited without the King's licence, except to lords, and freeholders of 200 merks a-year. And in the following reign cross-bows and *hand-guns* were prohibited, whereby the King's deer, and of other lords of this his realm, are destroyed," except to those having 300 merks, or the King's licence. The enactment is renewed by subsequent statutes; and shooting with cross-bow, hand-gun, hagbut, or demihake is prohibited.

In the next reign the use of *bail-shot* was forbid. "Whereas, an act was made in the 33d year of Henry VIII. for some more liberty to shoot in hand-guns, haques, and haquebuts, by which act nevertheless it was provided, that no person should shoot in any of the above said pieces, but at a bank of earth, and not to any deer or fowl, unless the party might dispend L. 100 a-year, forasmuch as the said act having been devised, as it was then thought, for necessary exercise, tending to the defence of the realm, is grown since to the maintenance of much idleness,

“ idleness, and to such a liberty, that not only dwelling-houses,
 “ dovecots, and churches, be daily damaged with the abuse there-
 “ of, by men of light conversation, but also there is grown a cu-
 “ stomary manner of shooting *hail-shot*, whereby an infinite sort of
 “ *fowl is killed, and much game thereby destroyed*, whereby also the
 “ meaning of the said statute is defrauded, for that the said use
 “ of hail-shot utterly destroyeth the certainty of shooting, which
 “ in wars is much requisite; it is therefore enacted, That no
 “ person under the degree of a lord of parliament, shall shoot
 “ in any hand-gun, within any city or town, at any *fowl* or other
 “ mark, upon any church, house, or dovecot, nor shall any per-
 “ son shoot in any place, any *hail-shot*, or any more pellets than
 “ one at a time, on pain of L. 10, and imprisonment for three
 “ months.”

It has been supposed, that this statute had no relation to the game; but it will be observed, that it contains a double prohibition, not only of the use of guns, to the damage of dwelling-houses, dovecots, and churches, but also of the use of *hail-shot*, which of itself was equivalent to a prohibition of killing game with the gun. Accordingly the statute sets forth, “ That an in-
 “ finite sort of fowl had been killed, and much game destroyed,” by the use of hail-shot. Indeed, it is believed, were sportsmen confined to the use of ball, the game would generally escape with impunity; and though the statute prohibits the use of hand-guns, within cities and towns, yet it likewise prohibits the use of hail-shot in particular in every place whatever.

But supposing there was any ambiguity in this statute, there is none in that of James I. passed in the year 1604, intituled, “ An ^{James, c. 27.}
 “ act for the better execution of the intent and meaning of for-
 “ mer statutes made anent shooting in guns, and for the preserva-
 “ tion of the game of pheasants and partridges, and against the
 “ destroying of hares with hare-pipes, and tracing hares in the
 “ snow.” The preamble of the statute is in the following words:
 “ Forasmuch as there be diverse good and necessary laws and sta-
 “ tutes, which do inflict and impose diverse great and heavy pe-
 “ nalties, punishments, and forfeitures, upon such as should,
 “ with any guns, nets, cross-bows, or other instruments or en-
 “ gines, spoil or destroy the game of pheasants, partridges, he-
 “ ron, mallard, and such like, and upon such as kill or destroy
 “ hares with hare-pipes, cords, or other engines, or should kill
 F “ any

“ any hares by tracing and coursing them with dogs in the snow :
 “ And, nevertheless, of late years the several games above men-
 “ tioned, have been more excessively and outrageously spoiled
 “ and destroyed than hath been in former ages, especially by the
 “ vulgar sort, and men of small worth, making a trade and a li-
 “ ving of the spoiling and destroying of the said games, who are
 “ not of sufficiency to pay the said penalties in the said statutes
 “ mentioned, nor to answer the costs and charges of any that
 “ should inform and prosecute against them, in any of his said
 “ Majesty’s courts of record at Westminster, upon any of the said
 “ penal laws and statutes, by reason whereof few suits have been
 “ attempted upon the said laws, and for the said forfeitures,
 “ whereby the good thereby meant and hoped hath not succeed-
 “ ed, and thereby great scarcity of the said games in all or in the
 “ most parts of this realm hath followed, and presently is, and so
 “ is like to be, if some remedy be not in that behalf provided.”

Upon this preamble severe penalties are enacted against whoever
 “ shall shoot at, or destroy, with any gun, cross-bow, stone-
 “ bow, or long-bow, any pheasant, partridge, house-dove, or
 “ pidgeon, hearn, mallard, duck, teal, widgeon, grouse, heath-
 “ cock, muir-game, or any such fowl, or any hare.” And so
 strictly was this enactment to be interpreted, that it was not e-
 ven lawful to shoot with hail-shot at birds that did not come un-
 der the denomination of game, without a special licence for that
 purpose. Accordingly there is a separate clause in the statute,
 which provides, “ That it shall and may be lawful to and for e-
 “ very person or persons keeping any hawk or hawks, which, at
 “ the general quarter-sessions of the county where he and they
 “ shall dwell, shall be licenced to shoot hail-shot in hand-guns
 “ or birding-pieces, at crow, chough, pye, rook, ring-dove, jay,
 “ or smaller birds, for hawks meat only, to shoot and kill hawks
 “ meat according to the said licence only, so that such party so
 “ to be licenced do at the same quarter-sessions wherein he shall
 “ be licenced, become bound to the King’s Majesty, by recog-
 “ nifance in L. 20, not to shoot at any of the fowl or game at
 “ which shooting is prohibited by this law.”

The statute of James I. was continued by that of the 13th and
 14th of Charles I. and it does not appear, that either that statute, or
 the former of Edward VI. was abrogated sooner than the year
 1695, when the latter was expressly repealed. “ And whereas,
 “ by an act made in the 2d and 3d years of the reign of Ed-
 “ ward

“ ward VI. late King of England, intituled, *An act against the shooting of hail-shot*, whereby, amongst other things, it is enacted, That no person, under the degree of a lord of the parliament, should shoot, in any place, any hail-shot, or any more pellets than one at any one time, upon pain to forfeit, for every time that he or they should so offend, L. 10, and imprisonment of his body during three months; which said act, however useful in those days, hath not for many years last past been put in execution, but became useless and unnecessary: yet nevertheless several malicious persons have of late persecuted several gentlemen *qualified to keep and use guns*, upon the said act: For remedy whereof, be it enacted, by the authority aforesaid, That the said act, and every article, clause, and thing, therein contained, shall be, and is hereby repealed, and made void, to all intents and purposes whatsoever.”

From this comparison of the laws in the two kingdoms, a remarkable degree of similarity appears. They are explained by the English authors, upon the principle, that game belongs to the King; nor can they be explained upon any other. They are no less inconsistent with the idea of a right of several property subsisting in the owner of the soil, than with a right by mere occupancy competent to every person that chuses. If game belongs to the owner of the ground on which it is found, why may he not kill it when and in what manner he thinks fit? If it belongs to the first occupant, why is he restricted in the mode of occupation? We do not find, that the Roman law laid any restriction upon the acquisition of those things which were denominated *res nullius*. But there are none such known in the law of any country which acknowledges a feudal origin: and as it has been shown and admitted, that the property of game is not in the subject as an accessory of the land, it must follow, that it is in the state, or in the King, the representative of the state.

It is indifferent to the respondent, whether that property shall be held to be vested in the King, as the English lawyers hold, or in the public. In either view, whoever pretends right to game must instruct his qualification under the act of the legislature, or the grant of the Sovereign. At the same time, it is humbly apprehended your Lordships will rather incline to hold that the right is in the crown. This is more agreeable to the general feudal principle with respect to *bona vacantia*, which are held universally

Game belongs
to the King.

to

to be vested in the Sovereign; and it is supported by the statute-law of this country. The power of naming *masters of the game* is acknowledged by the act 1685, c. 20. which ratifies a proclamation of Charles II. to that effect, and requires the *masters of the game*, along with sheriffs and other magistrates, heritors, liferenters, and wadsetters, to be diligent and vigilant in putting the laws in execution. This power is also recognised by the act 1698, c. 15. which ratifies the former statute, continuing the prohibition against the use of nets for seven years longer, "and ordains the *masters of the game*, sheriffs, bailies of regalities, stewartries, justices of peace, and other judges, to put the same in full and vigorous execution." And likewise by the statute 1707, c. 13. which "appoints and ordains all sheriffs of shires, stewarts of stewartries, justices of peace, *masters of the game*, bailies of boroughs or regalities, to put the same in due execution, under the penalty of L. 100 Scots."

And the appellant must instruct his qualification.

The respondent will now beg leave to assume it as an established proposition, That game being vested in the Sovereign, every person claiming right to it must instruct the qualification upon which he pleads. In the present case the justices have found, That the appellant had not a sufficient qualification; and before he can ask your Lordships to reverse that judgement, it is incumbent upon him to show, that he has a sufficient qualification for killing game upon the property of others, to condescend what that qualification is, and to point out evidence to instruct it. His counsel were sensible that he could not do this; and they endeavoured to avoid the difficulty, by inverting the state of the question, and contending, that it lay upon the respondent to point out a disqualifying statute. The respondent cannot agree that this is a fair state of the question; for if he has been successful in tracing the true principle upon which it is to be determined, he apprehends the appellant must be looked upon in the light of a claimant, and must support his claim by pointing out the title upon which he has derived right to a property originally vested in the crown. It is scarcely pretended that he has done so; and when he has admitted in his declaration, that he killed game upon the property of gentlemen from whom he had no licence, the appeal would fall to be dismissed upon that simple ground.

But

But as the interlocutor of the justices makes no distinction between the appellant's pretended right of killing game upon his own property, or upon the property of others, and as it may enable your Lordships to give a judgement such as may regulate future cases, the respondent does not wish to avail himself of any specialty in this, and is willing to enter into the general question upon the broadest grounds.

And he is advised, that the only subsisting qualification for killing game is that of the act 1685, c. 20. The practice of hunting has continued more general than that of falconry; and thence perhaps it has happened, that though at this moment no man in the kingdom is intitled to shoot a hare, yet the shooting of wild-fowl has been permitted to certain persons by the statute 1685.

The only qualification is that of the act 1685, c. 20.

The preamble of the statute is, " Our Sovereign Lord and Estates of Parliament, now presently convened, taking to their consideration the great decay of game in this his ancient kingdom, especially in the low countries, notwithstanding of all the laws and acts of parliament, and *acts of privy council*, made thereanent by his royal predecessors, which does principally proceed through the not vigorous execution of the said laws and acts, and not exacting the fines and penalties therein contained."

Upon this preamble, expressly recognising the power of the crown to issue proclamations for regulating the game, and thereby acknowledging it to be the property of the Sovereign, the statute ratifies and approves the act of privy council issued by Charles II. upon the 9th of June 1682, intituled, *A proclamation reviving the laws anent hunting, hawking, fishing, and appointing masters of the game*. The statute likewise ratifies and confirms the former acts of parliament, relative to the game; but that can only mean in so far as those acts are not expressly altered by the statute, or by the proclamation, which is made a part of the statute. And the chief alteration is the allowing certain persons to use setting-dogs and fowling-pieces, as to which the enactment is as follows:

" And farther, we, considering that setting-dogs, and other engines for killing of fowl, is a great cause of the scarcity of game, we do hereby prohibit and discharge all persons to have or use setting dogs, unless he be an heritor of L. 1000 of value

“ lued rent, and have the exprefs licence of the masters of our
 “ game, within their feveral bounds, under the pain of 500
 “ merks *toties quoties*, in case of failzie: And we do hereby dif-
 “ charge all common fowlers, and shooters of fowls, or any o-
 “ ther perfons, except they be domestic fervants to noblemen or
 “ gentlemen who are heritors of L. 1000 of valued rent, to
 “ have, or make use of, fetting-dogs or fowling-pieces, under the
 “ pain of efcheat of fuch dogs or guns, and imprifonment of
 “ their perfons for the fpace of fix weeks *toties quoties*.”

Then follows the nomination of masters of the game, consist-
 ing of the principal perfons in the different parts of Scotland,
 named, fo far as appears, without diftinction of parties; for it
 is an absolute miftake, as will immediately appear, to look upon the
 act in the light of a difarming ftatute, or to conceive that it was
 intended for political purpofes. The remaining part of the act
 contains an injunction to the masters of the game, fheriffs, and
 others, to be punctual in the execution of the law, and a prohi-
 bition of the use of nets.

Act 1685 not
 a political en-
 actment.

A very erroneous account was given, in a pamphlet published
 in the year 1772, of the history of this ftatute 1685; and your
 Lordships were entertained with a variety of topics of the fame
 kind by the appellant's counfel in this caufe, who were pleased
 to fay, That the proclamation and the ftatute, for they muft go
 together, were the moft tyrannical meafures of two defpotic
 reigns; under the harmless idea of preferving the game, they
 were no lefs than *difarming acts*, to prevent any refiftance to the
 arbitrary meafures that were meant to be purfued. But it is at
 leaft a fingular circumftance, and it was admitted by the coun-
 fel for the appellant, that not one of our hiftorians has confidered
 either the proclamation or the ftatute in that light. Even Lord
 Fountainhall, whom they referred to, though little apt to approve
 the meafures of the then governing party, and who, as he feldom
 conceals his sentiments, is ready enough to fuggelt bad motives,
 which, perhaps, in fome cafes had no better foundation than his
 own fufpicions, did not fo much as conceive the idea that there
 was any political view in the appointment of the masters of the
 game. All he fays is, “ They (the privy council) made the act
 “ difcharging the killing of wild fowl, and all hunting, hawk-
 “ ing, and fifhing, without licence from the masters of the game,
 “ for the fhires therein nominat, which will lay a foundation
 “ for

Mar. 2. 5. 1680.

“ for fining.” Now, is it possible to conceive, that if the proclamation had been intended to disarm the country, a measure of so important a kind could have escaped the penetration of every person at the time, and the censure of those who were most disposed to look for occasions of it?

And this is not all: Not only did the idea never occur to our contemporary historians, or others, but there is positive evidence, that at the æra of the Revolution, when the statutes of the late unfortunate Monarch underwent a thorough discussion, the act 1685 was not among the number of those which were considered as obnoxious. The *Declaration of the Estates, containing the Claim of right*, has a long list of complaints; and one of the articles in the warrant for publishing the proclamation of William and Mary is, “ That *most* of the laws enacted in the parliament “ anno 1685, are impious and intolerable grievances.” But it is demonstrable, that the statute now under consideration was not comprehended under that censure: for though two acts of the following year rescind many of the statutes of Charles II. and 1690, c. 27. 28. most of those of his successor, particularly the 2d, 5th, 6th, 7th, 8th, 11th, 13th, 16th, 17th, 23d, 25th, 26th, 27th, 30th, 36th, 37th, 40th, and 42d acts of the very same session which passed the game-act, and four acts of the following session, yet that act, which was undoubtedly under the consideration of the legislature at the time, is not rescinded; and it will by and by appear, that it was expressly ratified a very few years after.

This *new* idea, therefore, which should convert the game-act into a political engine, is not only unsupported by authority, but contradicted by the authentic history of the law, to be found in the Statute-book. And it has as little foundation in the act itself: If your Lordships will look at the disarming-act, in the time of George I. you will find, that it prohibits all persons beyond the line chalked out, “ to have in their custody broad-sword or target, poinard, whinger or durk, fide-pistol or fide-pistols, or “ gun, or *any other warlike weapon.*” And that in the reign of George II. prohibits *arms and warlike weapons* in general. But the 19 Geo. II. statute now under consideration is of a very different nature, prohibiting nothing else but the use of setting dogs and fowling-pieces, without any provision for compelling even these to be delivered up, or for making a search in the hands of the possessors. Accordingly the idea of this being a disarming-act never occurred to

to any mortal at the time, nor, it is believed, till within these very few years. Indeed the respondent knows not but the author of the pamphlet already mentioned had the honour of the discovery, though it has been shown to have no sort of foundation either in the words of the statute itself, or in the ideas of its contemporaries.

The respondent begs pardon for spending so much time upon a popular argument, which he is persuaded would not at any rate have been listened to by your Lordships. The utmost length it could have been carried would be to infer, that the law is improper as it stands. Supposing it to be so, the question which your Lordships are to determine, is not what ought to be law, but what *is* law? If the law is productive of inconvenience, it may be rectified by the legislature; but if its enactment is clear, your Lordships will have no hesitation to determine upon it. At the same time it may be observed, that in deliberating upon a new law, were *that* the point in question, no man of reflection would propose a law which should have the effect of giving an unlimited power of killing game over the whole country, for that is the offence complained of, to every petty proprietor of a ploughgate of land, who may chuse to turn the country loose, by proclaiming among the manufacturers and farmers, that he is qualified to kill game over all Scotland, and can even authorise others to do the same. The respondent means nothing personal to the appellant, when he says, that, even according to his own account of his circumstances, they are by no means such as should intitle him to kill game under the preamble of the statute 1600, c. 23. to which his counsel referred. The appellant says, he is feuar of lands rated at L. 130 Scots of valuation. Double the valuation is about equal to the old rent; and suppose it to be again doubled in consequence of improvement, the yearly income will be little more than L. 500 Scots, which the respondent will be pardoned for thinking is far from being sufficient to bring him under the predicament of those who "by their *renewes* may beare the charges and burdings of the halkes, hounds, and dogs, requisit in sik pastymes."

Another observation of a similar nature was made, that a proclamation reviving acts of parliament had an extraordinary appearance. But, with submission, there is nothing either unprecedented or unconstitutional in a proclamation, putting the lieges upon

upon their guard, by informing them, that subsisting acts of parliament are henceforth to be strictly put in execution. Besides, if the respondent has been successful in showing, that the property of game is vested in the King, there could be no impropriety in his issuing proclamations to regulate that branch of his property. And, at any rate, as the act of privy council is expressly ratified by the statute, it thereby becomes part of the statute itself, and has the full authority of the three estates of parliament. But perhaps the respondent has enlarged too much upon these topics, which it is believed were rather intended for the audience than for your Lordships. And he will now endeavour very briefly to obviate the legal arguments which seemed to be relied upon by the appellant.

And it was contended, in the *first* place, That the statute was limited to the period of seven years, and therefore is long expired.

Obj. I.
Act 1685 said
to be tempo-
rary.

The appellant endeavoured to support this objection by distinguishing the *proclamation* from what he was pleased to call the *statutory part* of the act of parliament. But there is no room for any such distinction. The statute *revives, renews, ratifies, and approves*, the act of privy council in all its parts, which it recites at length, and thereby incorporates into the statute, and makes part of the statute, giving it the same authority as if it had at first proceeded from the legislature itself, which adopts the words of the proclamation, and makes them its own words. It is very true, that after the recital of the proclamation, there is a prohibition of the use of nets, which is limited to the space of seven years; but that limitation has no sort of connection with the former part of the statute, which is clearly perpetual, and must remain in force, unless it can be shown to have been repealed.

Answer.

It has been already observed, that, so far from meaning to repeal the act 1685, the first parliament after the Revolution, when rescinding almost every act of James VII. did not comprehend this statute in the number. *They* were less acquainted, it would seem, with the motives of Charles II. and his brother, in issuing the proclamation, and getting it ratified by parliament, than our modern sportsmen are. It did not occur to *them*, that, under the figure of a game-law, it was really a disarming act; and the oppressive views, and ruinous consequences, which the appellant

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has

has discovered in that statute, were unknown to the meeting of estates in 1689, and to the members of the legislature in 1690.

1693. c. 15. Nay more, at the distance of *thirteen* years after the act 1685, and under the government of *King William*, it was thought proper to ratify this tyrannical act of his predecessor. The appellant's counsel were a little at a loss how to reconcile this statute with their declamatory arguments upon the despotic government of James VII. They had recourse, therefore, to their former distinction between that part of the statute which borrows the words of the proclamation, and the remaining part of it, which they wished to represent as constituting the whole body of the statute. The respondent believes he has stated the argument fairly, and he will answer it in the words of the legislature.

They borrowed even the title from the parliament of James VII.; for, like that statute, the act 1698 is intitled, *Act for preserving the game*. The preamble is, " Our Sovereign Lord, considering
 " that the laws and acts of parliament for preserving of the game
 " has not hitherto been put to due execution, as they ought to
 " have been; therefore his Majesty, with advice and consent of
 " the estates of parliament, *renews, ratifies, and revives*, all former laws made for preserving of game, and *particularly the*
 " *20th act, parl. 1. sess. 1. Ja. VII. in the year 1685*; and ordains
 " the same to be put to full execution *in all points*." Had the statute stopped here, the respondent would humbly contend, That there could not be a doubt, that every part of the statute, whether expressed in the words of the proclamation, or added to it, was as fully ratified and confirmed as it was in the power of a free legislature to do. But the subsequent part of it shows, that what the appellant would consider as the *whole* statute, was, by King William and his parliament, considered as only a small part of it. For the act proceeds, " And there being a clause in
 " *the end of the said act*, that, for the preservation and increase of
 " partridge, muir-fowl, heath-fowl, and quails, which are so
 " much decayed of late, it was statute and ordained, That no
 " person or persons whatsoever shall make use of setting dogs
 " with nets for taking or killing of partridges, muir-fowls,
 " heath-fowls, or quails, within any part of the kingdom, for
 " the space of seven years immediately after the publication
 " thereof, under the pain of forty merks Scots for each fowl that
 " shall

“ shall be so taken, to be paid by the killers or takers, to the ma-
 “ sters of the game and their deputies, or others, who should
 “ pursue the same. And it being just and reasonable, that the
 “ said clause should be continued for some time longer, there-
 “ fore his Majesty, with advice and consent of the estates of par-
 “ liament, statutes and ordains, that the *said clause* be continued,
 “ and hereby continues the same for seven years after the publi-
 “ cation hereof; and ordains the masters of the game, sheriffs,
 “ bailies of regalities, justices of peace, and other judges, to put
 “ the same in full and vigorous execution.”

It is remarkable, that the *masters of the game*, so much railed at now-a-days, when in their graves, as the mere creatures of arbitrary power, were considered in a very different light by the parliament in 1698, when many of them were alive: for the execution of that act is committed not only to sheriffs, bailies of regality, and justices of the peace, but likewise to the *masters of the game*, whose nomination it would seem was none of the acts which were either *useless*, or *found to be hurtful*; the predicament under which the rescinded acts of the two brothers are brought in the act 1690, c. 28.

It was said in the next place, That the act 1685 was repealed by the act 1707, c. 13.

The appellant cannot give a better answer, than by reciting the words of that statute itself. The first part of it contains regulations respecting the close time; and the act proceeds in the following words: “ As also it is hereby discharged, That no *common fowler* shall presume to hunt on any grounds without a sub-
 “ scribed warrant from the proprietors of the said grounds, un-
 “ der the penalty foresaid, besides forfeiting their dogs, guns,
 “ and nets, to the apprehenders or discoverers. And it is hereby
 “ farther provided, That no fowler, or any other person whatso-
 “ ever, shall come within any heritor’s ground, without leave
 “ asked and given by the heritor, with setting dogs and nets for
 “ killing fowls by nets; and if any common fowler shall be
 “ found in any place with guns or nets, having no licence from
 “ any Nobleman or heritor, they shall be sent abroad as recruits;
 “ as also, that no persons whatsoever shall shoot hares, under the
 “ foresaid penalty. And for the better executing this law, her
 “ Majesty, with advice foresaid, appoints and ordains all she-
 “ riffs of shires, stewarts of stewartries, justices of peace, *masters*
 “ of

Obj. II.
 Act 1685 said
 to be repealed
 by 1707,
 c. 13.
 Answer.

Act 1707,
 c. 13.

“ *of the game*, bailies of burghs or regalities, to put the same in
 “ due execution, under the penalty of L. 100 Scots; for which
 “ penalty, it is hereby declared, That the said judges shall be
 “ liable to the pursuer or complainer, before the Lords of Ses-
 “ sion, upon an instrument taken by the said pursuer or com-
 “ plainer, that the judge applied to refused or delayed to cog-
 “ nosce the complaint according to law, and to decern in terms
 “ of this act: And lastly, her Majesty, with consent foresaid,
 “ does hereby *ratify and approve all former acts made anent the game*,
 “ except in so far as they are hereby innovate and altered by this
 “ present act.”

It will be observed, that there are no repealing words in this statute; and the respondent cannot conceive by what rule of interpretation the sense of it can be so perverted as to construe it into a repeal of any former law. It introduces no new qualification, but only enacts severer penalties upon *common fowlers*, particularly upon such as use nets. Nay more, it contains an express ratification of all former acts anent the game, “ except in so far as they are hereby innovate and altered by this present act.” The alterations introduced by it were, first, with respect to the *close time*, which was now declared to be for muir-fowl, from the 1st of March to the 20th of June, and for partridges from the 1st of March to the 20th of August, in place of the enactment of the act 1685, “ forbidding the killing of muir-fowl-pouts before the 1st of July, heath-pouts before the 1st of August, or partridge or quail before the 1st of September yearly;” and making the close time for *old* birds of all kinds from the first day of Lent to the 1st of July yearly; an absurd regulation, no doubt, as if the growth of birds depended upon the time of Easter Sunday. The only other alteration, by the act 1707, is, that no person whatever can use nets upon another’s grounds without leave; and that common fowlers, using nets, may be sent abroad as recruits. In other respects, the former statutes are *ratified*; and it will not escape observation, that the act is appointed to be carried into execution by the *masters of the game*, as well as by sheriffs and other magistrates.

Obj. III. It was likewise pleaded, That the act 1685 is in desuetude.

Ans. But without entering into the general argument, how far an act of parliament, for regulating a matter of public police, is capable of losing its force by mere disuse, the respondent contends, that

Act 1685 said
to be in desue-
tude.

that the act 1685 is referred to in every British act extending to Scotland, which has been passed upon this subject; as those of the 10th and 12th of Queen Anne; the 24th of Geo. II. c. 24.; the 1st of Geo. III. c. 21.; and the 13th of Geo. III. c. 54. None of these acts determine any thing with respect to the qualification, but referring to the former statutes, enact penalties against *unqualified* persons.

This is the case with regard to the act of the 13th of the present King, now pursued on, which enacts, " That every person
 " whatsoever, *not qualified* to kill game in Scotland, who shall
 " have in his or her custody, or carry at any time of the year,
 " upon any pretence whatsoever, any hares, partridges, pheasants, muir-fowl, tarmagans, heath-fowl, snipes, or quails,
 " without the leave or order, of a person *qualified* to kill game in
 " Scotland, for carrying such hares, or other game, or for having the same in his or her custody, shall for the first offence
 " forfeit and pay the sum of 20 s. Sterling, and for the second
 " and every other subsequent offence, the sum of 40 s. Sterling."

It is plain, therefore, that in the idea of the legislature there is a *subsisting qualification*; and your Lordships are to determine what that qualification is. In this view only two statutes have been seriously insisted upon, the act 1621, c. 31. and the act 1685, c. 20. Now, if the respondent can satisfy your Lordships that the act 1621 is *not* the qualification, it follows, by the appellant's admission, that the act 1685 *is* the qualification.

In this view it is material to attend to the terms of the act 1621. It is intitled, " Anent hunting and haulking;" and the enactment Act 1621.c.31. is, " Our Sovereigne Lord and Estates of this present parliament,
 " statutes and ordaines, That no man hunt nor haulk at any time
 " hereafter, who hath not a plough of land in heritage, under
 " the paine of ane hundreth pounds. Ordaines his Majestie to
 " have the one halfe of the penaltie of the contraveeners of this
 " present act, and the dilator to have the other halfe of the said
 " penaltie."

If this was intended to be a qualification, it is expressed in very extraordinary terms; for except the enactment, that his Majesty is to have the half of the penalty incurred by contraveners, the whole act is a mere negative. It prohibits indeed every person to hunt and hawk who hath not a plough of land in heritage; but it gives no permission to the proprietor of a ploughgate, or

to any person whatever. And though it might not have been thought proper to subject a small proprietor in a penalty of L.100 for killing a hare or a partridge upon his farm, it does not follow that it was meant to authorise them to do so, still less to empower them to destroy game upon the property of others. Besides, were it possible to construe this *negative* statute into a qualification, it must be admitted to be a partial one at best. It never can be extended to the privilege of *shooting*, which was unlawful for more than sixty years after, till at length it was permitted to certain persons, by the act 1685, ten years before that liberty was given in England. And in that view of the case, it would not avail the appellant, who admitted, in his declaration, that he had killed muirfowl upon the muir of Galston upon the 12th and 13th of August without licence from the proprietor.

But the respondent humbly apprehends, that no argument can be founded upon the act 1621. He has the authority of Sir George Mackenzie, in his Observations upon it, to say, that it was in desuetude a *hundred* years ago. These Observations were published in consequence of a licence, bearing date 25th March 1686, within less than *ten months* after the act 1685 was passed; and yet this statute has been supposed to contain a ratification of the former. And no doubt the printed statute-book does contain a ratification of "the 31st act of the 23d parliament of King James VI. whereby all persons who are not heritors are prohibited to hunt or haulk; and that neither heritor or other shoot deer or roe in time of snow." It is impossible to suppose that Sir George Mackenzie, a member of the legislature, and who was engaged in compiling Observations upon the statutes at the time, could have imagined that an act was in desuetude, which had been expressly ratified but a few months before. The respondent is persuaded, therefore, that the *number* of the act, which is printed in figures, is erroneous; and that the chapter of the parliament 1621, actually ratified in 1685, was not the 31st act, which contains not a syllable about *shooting deer or roe in time of snow*; but the 32d act of the same parliament, which contains that prohibition in express terms. He was hopeful to have got some light from the record; but though he saw a manuscript copy of the acts of parliament, containing the act 1685 as it stands in the printed copies, and also the 31st and 32d chapters of the
year

year 1621 as two separate acts, yet no authentic record of the act 1685 was to be found ; and, upon inquiry, the records of the Privy Council, at the period of the proclamations 1680 and 1682, are unfortunately lost.

In these circumstances it is thought that the authority of Sir George Mackenzie will be held as decisive, to show that the 31st act of the parliament 1621, is not that which was ratified in 1685 ; and of consequence that it has been in desuetude for more than a century.

This at least is clear, that the act 1685 cannot be considered as ratifying the act 1621, c. 31. in so far as the one is contrary to the other, or giving a privilege to the heritor of a plough, which is expressly limited to gentlemen possessed of estates of L. 1000 of valued rent.

At any rate, the most sanguine advocates for the act 1621, have never ventured to maintain, that it authorised the proprietor of a plough of land to destroy game over the whole kingdom. But unless this can be maintained, the appellant has no plea ; for not only did he acknowledge, that he had killed muirfowl without licence from the proprietor of the lands, but also, “ that his dogs “ have killed a hare, or hares, within the space of six months “ preceding the date of the libel ; but *does not recollect* upon whose “ property it was ; and in respect of his defence, *thinks it is not “ material.*”

The respondent makes no doubt of the candour of this declaration. Indeed, according to his information, the appellant's range was so extensive, that it was difficult for him to recollect upon whose grounds he was trespassing upon a particular day. Nor can your Lordships assilzie him, or alter the sentence of the justices, without finding that the smallest proprietor is intitled to destroy the game of every kind in all parts of the kingdom. And he *knew* he was doing wrong ; for he contented himself with pleading before the justices, that he was intitled to kill game upon his own property, and disclaimed all pretence of right to kill it any where else.

The appellant therefore could not be defended upon the act 1621, even taking it in the sense which he himself puts upon it, and admitting it to be in full force at this day. It is clear likewise, that he comes under the prohibition of the act 1707, which enacts,

enacts, " That no *common fowler* shall presume to *hunt* on any " grounds without a subscribed warrant from the proprietors of " the said grounds." And this clause applies equally to the killing of four-footed game as of wild-fowl. The term *fowler* is no doubt applicable to the last; but the expression of *hunting* is only applicable to the former. It were to be wished, that the denomination of *common fowler* had been defined in the statute; but since it is not, it can only be explained from analogy. And if a *common* usurer, a *common* forestaller, or a *common* regrator, are expressions applied to those who are habitually guilty of these several transgressions; the denomination of a *common* fowler is equally applicable to a habitual poacher. The acts of parliament against *common swearers* are not limited to the lowest of the people: on the contrary, they enact different penalties, higher according to the rank of the offender, from twelve pennies, to be exacted from a prelate of the kirk, earl, or lord, for each oath, to one penny from a craftsman, yeoman, or serving-man. The appellant therefore will come under the denomination of a *common fowler*, and as such might be made liable in the penalties of the act 1707.

But he is likewise liable to the penalty of the statute of the 13th of his present Majesty, upon which alone he was prosecuted; and which, so far as the *qualification* is concerned, will be understood to refer to the act 1685, prohibiting all persons, but heritors of L. 1000 Scots of valuation, to kill game. And this leads to the last objection offered for the appellant, which will be found to have as little weight as any of the former.

Obj. V.
Licence from
masters of the
game said to
be necessary.

It was said, That it was not enough to be an heritor of L. 1000 Scots of valued rent; for that the statute likewise requires, that they " have express licence of the masters of our game." And hence it was inferred, that the statute expired with the lives of the persons appointed masters of the game by the act of privy council.

Answer.

But the objection would come to this, That no person whatever is qualified to kill game: of consequence the appellant was justly convicted as an unqualified person: so that the argument clearly recoils upon himself. The idea however is so adverse to the uniform sense of the country, that it cannot possibly be adopted by your Lordships. Indeed it is refuted by the whole train of statutes passed since the Union; in the reign of Queen Anne, in the reign of George II. and in that of his present Majesty, all of them lay

lay it down, that there is a subsisting qualification, which the appellant humbly apprehends is only to be found in the act 1685.

And though the objection founded on the present non-existence of masters of the game, is plausible at first sight, the slightest attention will show that it is not solid. By the joint act of King, Lords, and Commons, proprietors of L. 1000 of valued rent received a franchise of killing game; but it was subjected to a restrictive power in the crown, of naming masters of the game, from whom these proprietors were to take licences. And no doubt, so long as masters of the game were appointed, those gentlemen were obliged to take licences from them; though there is no reason to believe, that in practice such licences ever were denied, or indeed could be denied to the qualified persons. But will it follow from this, that because for about a century past the Sovereign has not thought fit to exercise his restrictive power, persons enjoying the qualification prescribed are to be deprived of their legal right? If the Sovereign cannot recal a statute by a positive act, it will be strange to maintain, that he can repeal it, by failing to exercise a power which was given him as a sort of restriction of the qualification. He has waved his privilege; and supposing he could claim it now, still, till he does claim it, the right of the persons enjoying the qualification in the statute may be exercised without any restriction. Indeed it is a rule in law, That an impossible condition is null and void; and since neither his present Majesty, nor any king since the time of the Revolution, has been pleased to name masters of the game, it is impossible to maintain, that gentlemen otherwise qualified are to be stripped of their right for not complying with a condition which in these circumstances cannot be complied with.

In every view of this case, the respondent apprehends your Conclusion. Lordships will incline to affirm the judgement of the justices. If he has been able to make out, that by the principles of the law of Scotland the property of game is vested in the state, or in the King, the consequence is obvious, that whoever pretends right to it, must establish that right under an act of the legislature, or a grant of the Sovereign. The appellant, *feuar* of a piece of land which he rates at L. 130 Scots of valuation, and admits he holds of a subject, does not pretend that he has any grant from the crown; nor does he even produce a base infestment with a

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clause

clause *cum aucupationibus et venationibus*. He rests his plea upon the act 1621, a statute purely negative, which at any rate contains no qualification to shoot, which appears to be repealed by subsequent statutes, or at least to be in desuetude.

It is humbly submitted therefore, that the appellant failed in instructing that he has right to kill game, and therefore was justly found liable by the justices as an unqualified person.

At the same time, in a case which, though it has frequently been before justices of the peace, and other inferior judges, has not hitherto received a judgement of the supreme court, it was thought not improper to endeavour to point out what the qualification is which is referred to in the British statutes. And if your Lordships think it proper or necessary to give any decision upon that subject, it is hoped you will find it to be that of the act 1685.

In respect whereof, &c.

GEO. FERGUSSON.



